BSN COMMERCIAL BANK (MALAYSIA) BHD

v.

KDG HOLDINGS (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-1307-1997]
7 JANUARY 1999

CIVIL PROCEDURE: *Service - Notice of demand - Proof of posting - Whether posting must be proved by affidavit of person who actually posted demand - Whether notice of demand is a "court" document - Whether rules of court apply to service of documents under a contract - Rules of the High Court 1980, O. 62 rr. 1(1), 6(1) & 9*

CIVIL PROCEDURE: *Summons-in-chambers - Grounds of application - Whether grounds must be stated in Form 62 - Whether grounds may be included in affidavit supporting application - Rules of the High Court 1980, O. 32 r. 1*

CONTRACT: *Guarantee - Guarantee subject to limited amount - Whether guarantor's liability limited to such amount - Whether interest on such amount not claimable*

This was an appeal against the dismissal of the plaintiff's application for summary judgment in relation to a claim under a guarantee agreement. The plaintiff's summons-in-chambers stated that the grounds of the application were contained in the affidavit in support of the application for summary judgment. The said affidavit also exhibited copies of the letters of demand and postal documents sent to the defendants. An officer of the plaintiff, not being the one who posted the letters of demand, averred that the said exhibits were sent to the defendants.

In resisting summary judgment, three issues were raised by the defendants. Firstly, they contended that the application failed to comply with O. 32 r. 1 of the Rules of the High Court 1980 ('RHC') in that the summons-in-chambers failed to state the grounds of the application. Secondly, the defendants argued that the posting of the letters of demand was not proved. It was contended that since O. 62 r. 9 of the RHC provides that proof of service of a document must be by affidavit of the person who served the document, similarly, posting can only be proved by the affidavit of the person posting. Thirdly, the defendants argued that a particular clause in the letter of guarantee limited their liability to a maximum of RM500,000 and thus the plaintiff was not entitled to claim interest on this as was attempted to be done.

Held:

[1] It would be sufficient compliance with Form 62 if a summons stated the grounds by reference to an affidavit in support of the application as was done in this case.

[2] Order 62 of the RHC, including r. 9, applies only to service of "court" documents, that is to say, a "document which by virtue of these rules is required to be served on any person." It does not apply to service of documents under a contract, which is what the letters of demand in this case were.

[2a] Order 62 r. 6(1) of the RHC does not make O. 62 applicable to service of other than "court" documents. The documents intended by r. 6(1) are also "court" documents. They are also documents that by virtue of the rules are required to be served on any person, only that the service of them is not required to be personal service.

[2b] Reliance on O. 62 r. 9 of the RHC cannot therefore avail the defendants for the contention that posting of the notice of demand in this case must be proved by the affidavit of the person who actually did the posting.

[3] There being no denial by affidavit by the defendants of receipt of the letters of demand, they must be taken to have received them and there can be no place, in the summary judgment proceedings, for the question of actual proof of their posting.

[4] The particular clause referred to by the defendants includes the phrase "with interest/additional interest on the sum claimable from me/us". This denotes that the guarantee does not only secure the principal amount up to the limit of RM500,000 but also the interest on that amount "from the date of my/our receiving demand for payment". The "sum claimable" must be the principal amount on which interest is leviable.

[Appeal allowed.]

Case(s) referred to:
AlliedBank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 2(1), O. 32 r. 1, O. 62 rr. 1(1), 6(1), 9

For the plaintiff - En Appaduray; M/s EJ Appaduray & Co
For the defendant - En Rajadevan Vamadevan; M/s Rajadevan & Assoc

Reported by Cindy Chan

a

JUDGMENT

Abdul Aziz Mohamad J:

In this appeal by the plaintiffs, the defendants raised three issues in resisting summary judgment.

b

First Issue

It was submitted that the summons in chambers by which the plaintiffs applied for summary judgment did not comply with O. 32 r. 1 of the Rules of the High Court 1980 in that it did not state the grounds of the application although c it did bear a statement referring for the grounds to the affidavit in support of the application.

A question that might have been raised by learned counsel for the plaintiffs is whether O. 32 r. 1, which concerns application in chambers by summons generally, applies to an application for summary judgment, in view of the fact d that O. 14 r. 2(1) sets out specifically the mode of applying for summary judgment. The point, however, was not raised. Be that as it may, I think it would be sufficient compliance with Form 62 if a summons stated the grounds, as was done in this case, by reference to an affidavit in support of the application.

e

Second Issue

This concerns service of the letter of demand on the defendants. To the affidavit in support of the plaintiffs' application for summary judgment are f exhibited copies of the letters of demand dated 12 November 1997 to the defendants ("MN-4" and "MN-4(a)") and copies of postal documents ("MN-5") which on their face show that on 12 November 1997 Pos Malaysia received from the plaintiffs' solicitors five registered postal packets, one addressed to the first defendant company, two addressed to the second defendant at two different addresses and two addressed to the third defendant g at two different addresses. Pos Malaysia numbered the five packets 395 to 399. In para. 7 of the affidavit, the maker of the affidavit, an officer of the plaintiffs who did not do the posting, averred that the letters of demand were sent to the defendants and referred to the exhibited copies of the letters of demand and the postal documents, clearly meaning to say that the letters of h demand were the five postal articles received by Pos Malaysia on 12 November 1997. It was accepted by learned counsel for the defendants that if posting of the letters of demand was proved, service must be presumed. His point was that posting had not been proved and that it could be proved only by the affidavit of the person who actually did the posting.

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For so contending, learned counsel for the defendants relied on O. 62 r. 9, which provides for the matters that must be stated by an affidavit of service of a document and which to learned counsel, I presume, implies that proof of service of a document must be by affidavit of the person who served the document.

I agree with learned counsel for the plaintiffs that O. 62, including r. 9, applies only to service of "court" documents, that is to say, as stated in r. 1(1), a "document which by virtue of these rules is required to be served on any person." It does not apply to service of documents under a contract, which is what the letters of demand in this case were.

Learned counsel for the defendants relied on r. 6(1) for contending that O. 62 also applies to service of other than "court" documents. That rule provides for the manner in which may be effected service of any document "not being a document which by virtue of any provision of these rules is required to be served personally". He construed that to mean a document that is not a "court" document, that is to say, a document that falls outside the scope of the words "a document which by virtue of these rules is required to be served on any person" in r. 1(1).

In my opinion, the documents intended by r. 6(1) are also "court" documents. They are also documents that by virtue of the rules are required to be served on any person, only that the service of them is not required to be personal service.

Reliance on O. 62 r. 9 cannot therefore avail the defendants for the contention that posting of the notice of demand in this case must be proved by the affidavit of the person who actually did the posting.

Alternatively, learned counsel relied for that contention on *AlliedBank (Malaysia) Bhd. v. Yau Jiok Hua* [1998] 3 CLJ 33; [1998] 6 MLJ 1. That was a full trial of a case in which the defendant contended that the notice of demand was not sent to him. There was a notice of demand P15 in respect of which the AR card ID16 had not been properly admitted in evidence. Augustine Paul J apparently considered that evidence was necessary "to show that the AR card had been returned duly acknowledged to constitute effective service of the notice of demand on the defendant". See p. 35A. That has no bearing on the case here because it is not a case of service by AR registered post and, moreover, it has been accepted that if posting were proved then service or receipt must be presumed. But what the learned judge went on to say is significant and of interest for this case. He said that in the absence of that kind of proof by AR card "it would have been sufficient for the plaintiffs to show that the notice was correctly addressed, prepaid and delivered to the

post office and acknowledged for service by the postal authority". No such evidence was adduced by the plaintiffs and we do not know from that case what kind of evidence would be sufficient to show all that. Suppose the plaintiffs in that case had in their possession such postal documents as have been exhibited by the plaintiffs here, and suppose there was a dispute that the postal documents related to the notice in question, would the learned judge have ruled that the documents themselves were not admissible unless produced in court by the person who actually received them from the post office or, if admissible, they did not prove, without the evidence of the person who posted them, that the packets were correctly addressed, prepaid and delivered to the post office?

Then there was another notice of demand ID6 which was sought to be related to AR card P7, and another, a Form 16E notice of demand under the National Land Code, which was sought to be related to AR card P10. The learned judge ruled at p. 35 F-G that the AR cards P7 and P10 only established that two postal articles were received by the servants or agents of the defendants but did not prove that the articles were the notices of demand. Proof was needed as to the contents of the postal articles and that was absent. But in the present case it was not the point of counsel for the defendants that there was no proof that the postal documents were related to the letters of demand.

I do not find anything in the *AlliedBank* case to support the proposition of learned counsel for the defendants that proof of posting of a postal article must always be by the evidence of the person who actually did the posting, even in an application for summary judgment.

I emphasise summary judgment because I am going next to look at the actual situation in the application for summary judgment in this case. In para. 6 of their statement of defence the defendants had positively denied receiving any letter of demand from the plaintiffs. That was not evidence but a position taken in the suit. I have already referred to the evidence of posting of the letters of demand that was exhibited by the plaintiffs' officer to his affidavit. Now the defendants' response to that evidence is in para. 5 of their affidavit dated 25 April 1998. Firstly they said that the postal documents did not show any acknowledgment by the defendants. That is merely argument as to proof of receipt which their counsel was not taking up. Then they said – cautiously and evasively it seems to me – that they had no knowledge of the contents of the letter. I say cautiously and evasively because they did not positively deny, as they had done in their statement of defence, receiving the letters of demand (or the postal articles containing them). Having no knowledge of the contents of the letter is not the same as not having received it because a person may well, by himself, his servant or agent, have received a letter and yet not

have bothered to look at it. With the kind of statement that the defendants made, were any of them to be accused of falsely saying he did not receive the letter, he might well turn round and say that he did not say so, that he merely said he did not have knowledge of the contents of the letter.

There having been no denial by affidavit by the defendants of receipt of the letters of demand, they must be taken to have received them and there can be no place, in the summary judgment proceedings, for the question of actual proof of their posting.

I should like to place it on record in this judgment that learned counsel for the plaintiffs said in submission that it was she who actually did the posting and if need be she could swear an affidavit to that effect.

Third Issue

This concerns cl. 5 of the letter of guarantee, which provides as follows:

> This Guarantee shall be a continuing guarantee to you to the extent of Ringgit Malaysia FIVE HUNDRED THOUSAND (RM500,000.00) for the purpose of securing not merely an equivalent amount but (subject always to the said limit of RM500,000.00) the whole of the moneys or general balance in Clause 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest/additional interest on the sum claimable from me/us at the rate which is levied on the Customer from time to time from the date of my/our receiving demand for payment thereof.

Learned counsel for the defendants argued that the defendants' liability is only up to RM500,000 and that the plaintiffs are not entitled to claim interest on it as they have done. In my opinion the phrase "with interest/additional interest on the sum claimable from me/us" denotes that the guarantee does not only secure the principal amount up to the limit of RM500,000 but also the interest on that amount "from the date of my/our receiving demand for payment (of the amount)". The "sum claimable" must be the principal amount on which interest is leviable.

Court

There are no triable issues. I allow the appeal. I make orders in terms of prayers (1)(a) and (b) of encl. (7), with costs for the plaintiffs here and below.